Supreme Court, U.S.
FILED
MAR 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-637

IN THE

Supreme Court of the United States

October Term, 1985

DONALD P. HODEL, Secretary of the Interior,

Appellant,

v.

MARY IRVING, *et al.*,

Respondents.

On Appeal from the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE SISSETON-WAHPETON SIOUX TRIBE

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TABLE OF CONTENTS

	PAGE
Interest of *Amicus Curiae*	1
Summary of Argument	6
Argument	
I. Section 207 of the Indian Land Consolidation Act Does Not Violate the Fifth Amendment Takings Clause	7
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Andrus v. Allard, 444 U.S. 51 (1979)	10
DeCoteau v. District County Court, 420 U.S. 425 (1975)	2, 3
Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977)	9
Jefferson v. Fink, 247 U.S. 288 (1918)	10
Mager v. Grima, 49 U.S. 490 (1850)	10
Mattz v. Arnett, 412 U.S. 481 (1973)	8
Morton v. Mancari, 417 U.S. 535 (1974)	9
Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976)	8, 9, 10
Seymour v. Superintendent, 368 U.S. 351 (1962)	8
Solem v. Bartlett, —— U.S. ——, 79 L.Ed.2d 443 (1984)	8
United States v. Mitchell, 445 U.S. 535 (1980)	9
United States v. Sioux Nation of Indians, 448 U.S. 371 (1980)	9

PAGE

Constitution, Treaties and Statutes:

U.S. Constitution, Fifth Amendment 7, 10, 11

Treaty of February 19, 1867, 15 Stat. 505 ..... 1, 2

General Allotment Act of 1887, 24 Stat. 388 2

Act of March 2, 1889, ch. 405, 25 Stat. 888 2, 5, 6, 7, 8, 10, 11

Act of March 3, 1891, 26 Stat. 1035 ..... 2, 3

Act of June 17, 1892, 27 Stat. 52 8

Act of March 22, 1906, 34 Stat. 80 8

Act of May 29, 1908, 35 Stat. 460, 460-461 8

Act of October 26, 1974, 88 Stat. 1468 4

Act of September 30, 1978, 92 Stat. 850 4

Act of October 19, 1984, 98 Stat. 2411 ..... 5, 6, 9, 10

25 U.S.C. § 2206 ..... 6, 7, 9, 10, 11

Legislative Materials:

130 Cong. Rec. S5601-S5602 (May 10, 1984) 4

130 Cong. Rec. H11433-H11434 (October 10, 1984) 4

Hearings on S. 2663 Before the Senate Select Committee on Indian Affairs, 98th Cong., 2d Sess. (1984) 3, 4, 5

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Interest of *Amicus Curiae*

The Sisseton-Wahpeton Sioux Tribe is a federally recognized Indian tribe with a governing body recognized by the Secretary of the Interior. The Tribe occupies the Lake Traverse Indian Reservation located in northeastern South Dakota and southeastern North Dakota. The Lake Traverse Indian Reservation was set aside as a "permanent reservation" for the Tribe by the Treaty of February 19,

1867, 15 Stat. 505, Article 3. The reservation encompassed 918,780 acres. *DeCoteau* v. *District County Court,* 420 U.S. 425, 438 n. 19 (1975).

Following enactment of the General Allotment Act, 24 Stat. 388 *et seq.,* the Lake Traverse Indian Reservation was the first reservation to be allotted. "[A]llotment of individual tracts of reservation land to tribal members was already 'virtually completed' " prior to December 12, 1889. *DeCoteau* v. *District County Court, supra,* 420 U.S. at 434. Some 127,887 acres of Reservation land had been allotted prior to that date. *Id.* at 438 n. 19. These allotments were made pursuant to the authority of the General Allotment Act, without benefit of any agreement with the Tribe,[1] and without the consent of the Tribe or its members. The Tribe was never compensated for the lands taken from tribal title and transferred to the fee title of the United States in trust for individual tribal members.

On December 12, 1889, the Tribe "agreed" to sell lands within the Reservation surplus to allotment, provided that all tribal members who had not yet received allotments would be allotted land, and that all members who had not received 160 acres would be allotted additional land in order to provide each tribal member with 160 acres. This agreement was confirmed in the Act of March 3, 1891, 26 Stat. 1035, §§ 26-30. The Tribe's circumstances in the harsh winter of 1889 indicate that the "agreement" was less than willing.

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1. The Lake Traverse Indian Reservation was not part of the Great Sioux Reservation affected by the Act of March 2, 1889, ch. 405, 25 Stat. 888, the allotment provisions of which are at issue in the case at bar.

> The Indians suffering from disease and bad harvests, developed an increasing need for cash and direct assistance.

DeCoteau v. *District County Court, supra,* 420 U.S. at 431. The Tribe was in a " 'destitute condition' " and needed the Government to " 'at once take steps to relieve the necessities [of] this long suffering people . . . slowly suffering death from privation and starvation.' " *Id.* at 432 n. 9.

Following the Act of March 3, 1891, members of the Tribe, pursuant to its provisions, received additional allotments totaling some 112,113 acres. *Id.* at 438 n. 19. By 1895, the Reservation had been carved into 1,369 individual allotments with the lands surplus to allotment being sold to non-Indian settlers.

During the last nearly 100 years, the original allotments have passed to successive generations of heirs. The heirs of the original allottees own an ever diminishing fractional interest in the original allotments. Allotments on the Reservation now average thirty heirs. Hearings on S. 2663 Before the Senate Select Committee on Indian Affairs, 98th Cong., 2d Sess. 61 (1984) (hereinafter "S. 2663 Hearings"). Hundreds of heirs of original allottees gain virtually nothing from their interest in the original allotment. Thus, a "Profile of Lake Traverse Reservation Fractionated Tracts of Land" prepared by the Sisseton Agency of the Bureau of Indian Affairs, shows ten original allotments having 247 to 464 heirs each, with many heirs receiving no annual income from the allotment and, with respect to eight of the allotments profiled, substantially more than half of the heirs receiving less than $1.00 in annual income from the allotment. *Id.* at 60.

The high degree of fractionation renders it impossible for most of the heirs to make any direct beneficial use of their fractional interest. Consequently, the Bureau of Indian Affairs leases the allotments and distributes the piddling income to the heirs.[2] *See,* 130 Cong. Rec. S5601-S5602 (May 10, 1984); 130 Cong. Rec. H11433-H11434 (October 4, 1984).

Beginning in 1974, the Tribe began to explore legislative solutions to the fractionated heirship problem. Act of October 26, 1974, 88 Stat. 1468. At the Tribe's request, this law was amended in 1978 to more effectively address the problem of fractionated heirships. Act of September 30, 1978, 92 Stat. 850. These laws, however, failed to provide a comprehensive approach to controlling the ever increasing fractionation of Reservation allotments.

In 1978, the Tribe determined to seek comprehensive legislation. Between 1978 and 1984, three successive tribal councils shaped legislation to control and eliminate unproductive fractionation of heirship land. Throughout the process, the tribal council held public hearings in each of the Tribe's seven political subdivisions. Many tribal members participated in these hearings and in other hearings on the subject held before the tribal council. The legislation that emerged from this process reflected the input of numerous tribal members, virtually all of them holders of fractional interests in allotments, and expressed the so-

2. In short, the Lake Traverse Indian Reservation allotment process, with its attendant fractionation of tracts, has created a virtual nightmare the complexity and depth of which can only be fully appreciated by reviewing the graphic depiction presented by Bureau of Indian Affairs historian Michael L. Lawson in "Heirship: The Indian Amoeba." *Id.* at 81-89. In 1982, there were 1,693 leases of Indian trust land within the reservation; 58 were held by Indians.

lutions to fractionation endorsed by the tribal council and the members of the Tribe.

At the request of the Tribe, Congress considered the legislation proposed by the Tribe and enacted it. *See,* Act of October 19, 1984, 98 Stat. 2411. The Act includes several different tools for tackling the fractionated heirship problem. Escheat is one of these tools. Under the Act, inheritance of interests in allotments is limited to enrolled members of the Tribe. *Id.*, § 2. However, the Act prohibits any tribal member "by devise or descent to take any interest . . . less than two and one-half acres . . . in trust or restricted land within the reservation." *Id.*, § 5. The interest of nonmembers and any interest less than two and one-half acres of a devisee or intestate distributee escheats to the Tribe. *Id.*, §§ 5 and 6.

The members of the Tribe endorsed the two and one-half acre minimum because this is the standard size of a rural homestead in the tribal community, the Department of Housing and Urban Development requires this amount of acreage as a homestead minimum in its Indian housing program, and because inheritance of a lesser amount would permit the continuation of poor land use caused by fractionation. S. 2663 Hearings, *supra*, at 63-64.

Since enactment, the escheat provisions of the Act of October 19, 1984 have caused fractional interests in certain allotments to revert to tribal title. If the Eighth Circuit decision herein is not reversed or is not narrowly applied to the historical circumstances involving the Great Sioux Reservation and the agreement that resulted in the allotments granted pursuant to the Act of March 2, 1889, ch. 405, 25 Stat. 888 *et seq.*, the constitutionality of the escheat

provisions of the Sisseton-Wahpeton Sioux Tribe's 1984 Act may be questioned. Without these escheat provisions, the Tribe's ability to control fractionation for the economic betterment of the whole Tribe will be severely impaired and significantly undermined.

Summary of Argument

For many tribes, the allotment policy has been a disaster, rendering most of the lands affected of little benefit to the tribes and their members. The escheat provision of the Indian Land Consolidation Act, 25 U.S.C. § 2206, facilitates the consolidation of tribal lands in a manner that will ultimately enable the tribe to put the lands to sound economic use for the benefit of all tribal members.

The allotment policy, as practiced with respect to most tribes, unilaterally abrogated tribal title and, without the consent of the tribe or its members, transferred the title to the private ownership of tribal members. The tribes were not compensated for the loss of title. Under these circumstances, the power to dispose of land at death was not a *quid pro quo* for the relinquishment of interests in tribal lands. Heirs of the original allottees never acquired a vested property right to the exercise of such a power and, therefore, Congress may constitutionally regulate the devise or descent of lands that have not as yet passed to the heirs.

It may be that with respect to some tribes, such as those affected by the 1889 Sioux Allotment Act, a vested property right to dispose of land at death, flowing from what was essentially a negotiated contract between the United States and the tribes, may have been acquired by the original

allottees and their heirs. Since this circumstance does not apply to most tribes, any finding affirming the court below should be carefuily limited to the peculiar facts of the 1889 Sioux Allotment Act. The escheat provision of the Indian Land Consolidation Act, on its face, should not be declared an unconstitutional violation of the Fifth Amendment takings clause.

ARGUMENT

I.

SECTION 207 OF THE INDIAN LAND CONSOLIDATION ACT DOES NOT VIOLATE THE FIFTH AMENDMENT TAKINGS CLAUSE.

The Eighth Circuit holding that section 207 of the Indian Land Consolidation Act ("ILCA"), 25 U.S.C. § 2206, violates the takings clause of the Fifth Amendment is rooted in "evaluation of the rights created in the [1889 Sioux] allotment statute and patents." 758 F.2d at 1258. The court construed the allotment statute as being "in the nature of a bargain." *Id.* According to the court, the Sioux allottees agreed to relinquish their claims to tribal lands on condition that they would retain the power to dispose of their property at death. *Id.* at 1268-1269. This power, upon execution of the Sioux agreement by the United States, became a vested property right that devolved to and that could be enforced by successors to the original allottee. *Id.*[3]

3. Carried to a logical conclusion, the holding would seem to preclude any regulation of the power that would disinherit successor heirs, contrary to the court's acknowledgement that "the right to receive property by inheritance or devise does not attain the dignity of a property right entitled to the protection of the fifth amendment taking clause." 758 F.2d at 1262.

Unlike the tribes affected by the 1889 Sioux Allotment Act, the Sisseton-Wahpeton Sioux Tribe witnessed the allotment of most of the Lake Traverse Indian Reservation by Secretarial action unrelated to any agreement negotiated with tribal members. Some additional allotments were issued following the 1891 congressional ratification of an agreement with the Tribe. The "agreement," however was concurred in under severe duress since the members of the Tribe were literally starving to death and were desperate for food, clothing and shelter. Applying the term "agreement" to such circumstances is a misnomer.

Like the Sisseton-Wahpeton Sioux, many tribes suffered the allotment of their reservation lands by unilateral Secretarial action, unconsented to by the members of the Tribe. *See e.g.,* Act of May 29, 1908, 35 Stat. 460, 461-462, construed in *Solem* v. *Bartlett,* —— U.S. ——, 79 L.Ed.2d 443 (1984); the Act of March 22, 1906, 34 Stat. 80, at issue in *Seymour* v. *Superintendent,* 368 U.S. 351 (1962); and the Act of June 17, 1892, 27 Stat. 52, discussed in *Mattz* v. *Arnett,* 412 U.S. 481 (1973). That bargains and agreements were not the usual predecessor to the issuance of allotments is not surprising. The "policy of assimilation underlying the allotment policy," *Northern Cheyenne Tribe* v. *Hollowbreast,* 425 U.S. 649, 660 n. 11 (1976), was bound to meet with resistance from the tribes and their members.

> The objects of this policy were to end tribal land ownership and to substitute private ownership, on the view that private ownership by individual Indians would better advance their assimilation as self-supporting members of our society and relieve the Federal Government of the need to continue supervision of Indian Affairs.

Id. at 650 n. 1. As history has clearly revealed, the object of the allotment policy was to diminish Indian landholdings to insignificance by ending tribal relations and breaking up the reservations. *United States* v. *Mitchell*, 445 U.S. 535, 544-545 n. 5 (1980).

The allotment policy, for the Sisseton-Wahpeton Sioux Tribe and the many other tribes upon whom the policy was imposed without consent, resulted in the expropriation without compensation of tribal lands guaranteed to the tribes by treaty, statute or executive order. *See, United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 415 n. 29 (1980). These tribal lands were arbitrarily alloted—transferred to the private ownership of tribal members. Viewed in this light, the escheat provisions of the ILCA and the 1984 Sisseton-Wahpeton Sioux Act merely effect a repatriation to the tribes of lands to which they previously held recognized title.

Since the problems caused by fractionation have rendered substantial acreages of Indian lands virtually useless to tribes and their members, restoring tribal title, by escheat, to certain small interests in land is a measure "tied rationally to the fulfillment of Congress' unique obligation to the Indians." *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 85 (1977), *quoting Morton* v. *Mancari*, 417 U.S. 535, 555 (1974). Land in tribal title benefits the tribe and the entire tribal community collectively. Concentration of land in the tribe will not only eliminate fractionation but, over time, will reestablish an economically viable land base for many tribes. For hundreds of tribal members, whose fractional interests are of no or almost no economic value, such concentration will actually enhance their interest, as the tribe will be able to make use

of the land in a way that provides tangible benefits to all members of the tribe. The escheat provisions of the ILCA and the 1984 Sisseton-Wahpeton Sioux Act are a sound way to achieve these ends.[4]

While it may be that specific statutes, like the 1889 Sioux Allotment Act, incorporated an enforceable contractual right, to pass an interest in an allotment to heirs, that cannot be impaired by statutorily imposed escheat, escheat, as provided for in ILCA and the 1984 Sisseton-Wahpeton Sioux Act, does not in most circumstances offend the takings clause of the Fifth Amendment. The interests to be escheated pursuant to these statutes generally have not passed to any heirs. *Northern Cheyenne Tribe* v. *Hollowbreast, supra,* 452 U.S. at 656-660. Therefore, the heirs have not acquired vested rights and Congress has the power to determine which property may descend by will or intestacy. *Mager* v. *Grima,* 49 U.S. 490, 493 (1850); *Jefferson* v. *Fink,* 247 U.S. 288, 294 (1918).[5]

In reviewing the Eighth Circuit decision, *amicus curiae* urges the Court to focus on the application of the ILCA to the peculiar facts pertinent to the 1889 Sioux Allotment Act. The different historical circumstances underlying the allotment of the reservation lands of other tribes suggests an analysis of the constitutionality of the ILCA escheat provision that is also different.

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4. Significantly, these statutes do not affect an heir's property interest during his lifetime. Any tribal member wishing to avoid the escheat provisions of these laws need only make an *inter vivos* transfer of an escheatable interest or purchase fractional interests sufficient to bring the member's interest above the statutory minimum for an inheritable interest. *See, Andrus* v. *Allard,* 444 U.S. 51, 65-66 (1979).

5. Even for heirs with vested rights, hundreds hold interests of no economic value. No compensation would clearly be "just compensation" for the taking of such an interest.

CONCLUSION

It takes little imagination to predict the future for tribes and their members if fractionation of allotments is not brought under control. Fractionation will continue to increase at an accelerating pace, further diminishing the ability of tribal members to use their land and become self-determining. Non-Indian lessees will be the only beneficiaries of the use of tribal lands.

The Court of Appeals should be reversed. If affirmed, the affirmation should clearly be limited. Any conclusion that 25 U.S.C. § 2206 violates the takings clause of the Fifth Amendment should be tied to the application of the section to the peculiar facts of the 1889 Sioux Allotment Act. The constitutionality of the section should be left unimpaired with respect to tribes that, as part of the allotment process, did not negotiate or bargain for the allottees and their heirs to have an enforceable contractual right to dispose of their property at death.

Respectfully submitted,

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